(30)

No. 397

In the Supreme Court of the United States

OCTOBER TERM, 1943

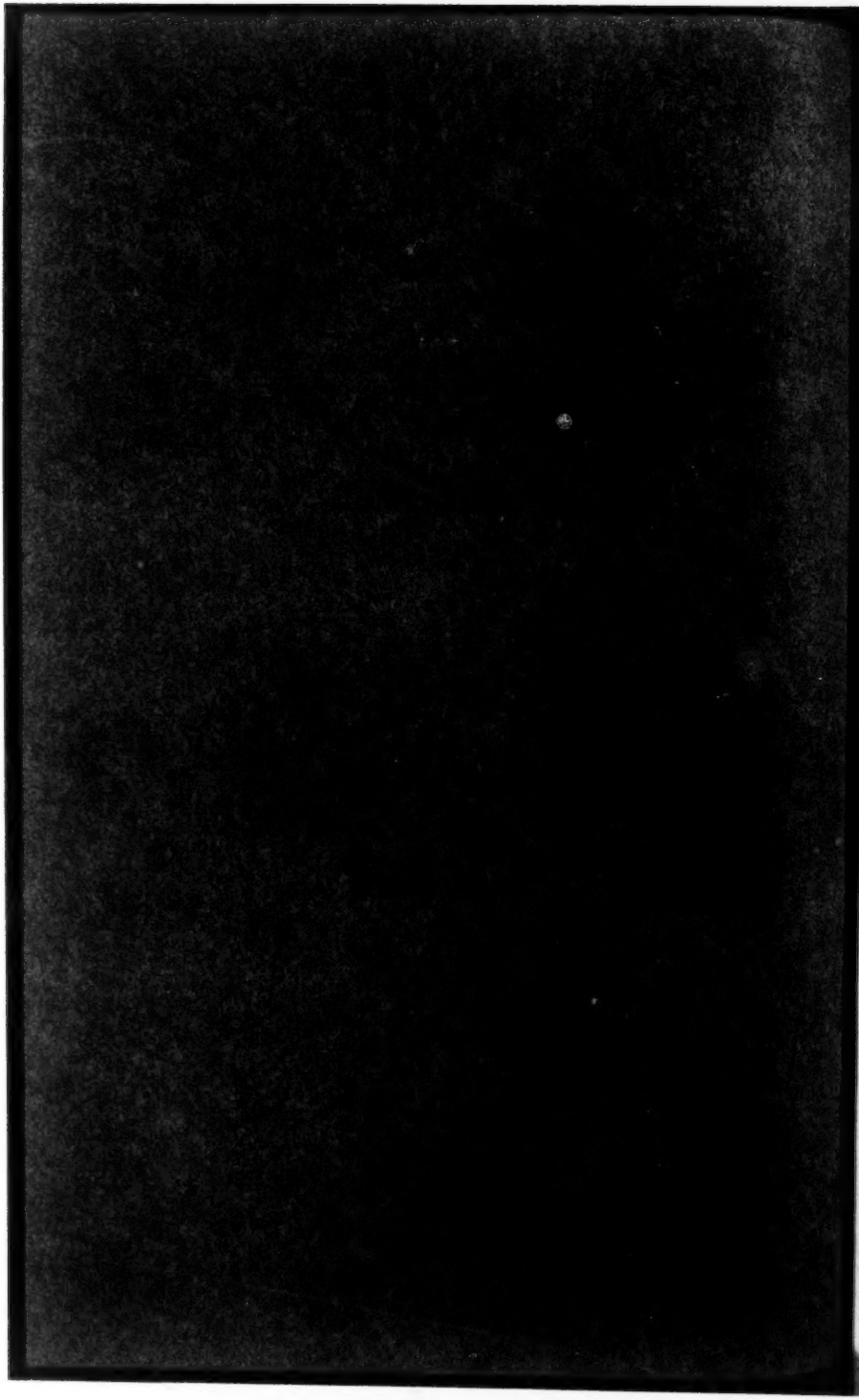
THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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OPINIONS BELOW

The oral opinion of the District Court on demurrer to the indictment (R. 76–91) was not reported. The opinions in the Circuit Court of Appeals (R. 111–130) are reported in 137 F. (2d) 459.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 30, 1943 (R. 130), and a petition for rehearing was denied September 1,

1943 (R. 149). The petition for a writ of certiorari was filed September 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal question presented is whether the allegations of the indictment sufficiently show the jurisdiction or venue of the district court. Other questions presented are whether the indictment alleges a violation of the Sherman Act, whether its allegations are too vague and indefinite to apprise the defendants of the nature of the offenses charged, and whether the indictment is duplicitous.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor * * *. (U. S. C. sec. 1.)

> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *. (15 U. S. C. sec. 2.)

STATEMENT

This case involves the validity of an indictment containing two counts. The first (R. 7–37) charges a conspiracy to restrain interstate commerce in food and food products throughout the United States and the second (R. 37–46) charges a conspiracy to monopolize such commerce, in violation of Sections 1 and 2, respectively, of the Sherman Act. The district court sustained demurrers to the indictment (R. 92). On appeal to the court below, it upheld the indictment except as to two defendants [1] and reversed and remanded the case to the district court for further proceedings (R. 111–119).

The defendants as to whom the indictment was upheld, the petitioners here, are The New York Great Atlantic & Pacific Tea Company, Inc., eleven corporate subsidiaries of that company, and sixteen individuals alleged to be officers, agents,

[1] The court below held that the demurrer to the indictment was properly sustained as to the defendants Carl Byoir and Business Organization, Inc., alleged in the indictment to be "public relations counsel for the A & P group" (R. 118–119). The Government has not filed a petition for writ of certiorari to obtain a review of this ruling.

or employees of one or more of the corporate defendants (R. 10–15).

Count one of the indictment sets forth the following facts, among others:

Petitioners are the largest purchasers, manufacturers, and distributors (both at wholesale and retail) of food and food products in the United States (R. 18). In 1942 they operated over 6,400 retail stores located in 37 States and in the District of Columbia (R. 24–27). They not only distribute food and food products to their own retail stores but also sell to other food distributors (R. 19–21).

The food and food products which petitioners manufacture or purchase in the various States are shipped to their warehouses in other States and are distributed from these points to their retail stores (R. 23). These stores, as well as petitioners' wholesale warehouses, are divided into seven geographical divisions, and officers and employees at the headquarters of each of these divisions are responsible for all wholesale and retail operations within the division's geographical limits (R. 24). Petitioners' retail stores requisition the commodities which they need from petitioners' warehouses, and the latter invoice commodities so requisitioned at retail prices, except that fresh meat is invoiced at wholesale prices subject to the requirement that it be sold at the mark-ups specified by the warehouse (R. 27).

Warehouse officials exercise jurisdiction over all books and accounts of petitioners' retail stores, make frequent inventories of store stocks, and check cash receipts (R. 27–28).

By virtue of the horizontal and vertical integration of petitioners' functions and business, petitioners have and exercise the power to dominate and control the production, prices, and distribution of a substantial part of the food and food products marketed in the United States (R. 29).

Count one charges the petitioners with having been engaged in a conspiracy in unreasonable restraint of interstate commerce and that this conspiracy consisted in a continuing agreement and concert of action to do the following (R. 29):

(a) To use their dominant position in the trade to injure and destroy, in selected areas, the competition of independent grocers, meat dealers, and small local food chains by selling products in these areas at lower prices than elsewhere and by combining with other national food chains operating in such areas to follow petitioners' prices during such price wars (R. 30);

(b) To prevent competition in selected trade areas by combining with independent grocers and local and national food chains to fix retail prices and with food manufacturers to fix resale prices, on food sold in such areas (R. 30);

(c) To obtain for themselves discriminatory buying preferences over competitors by controlling

the terms and conditions upon which manufacturers and other suppliers of food and food products shall sell to petitioners and to their competitors [2] (R. 31);

(d) To foster false comparisons of their prices with those charged by competitors (R. 34).

The indictment alleges that the conspiracy charged in count one "has been entered into and carried out in part" within the district in which the indictment was returned and that within the preceding three years petitioners have performed within that district many of the acts set forth as constituting a part of the conspiracy, and particularly advertising food and food products below cost for the purpose of injuring and destroying the competition of independent concerns and local chain stores (R. 36–37).

Count two reaffirms and incorporates all the factual allegations of count one (R. 37). It charges a conspiracy to monopolize a substantial part of interstate commerce in food and food products and that this conspiracy has consisted in a continuing agreement and concert of action to do certain things, which are set forth in the same terms as those which are described as having been part and parcel of the conspiracy charged in count one (R. 38–44). The allegations in support of the jurisdiction and venue of the district court are in

[2] Various means used to accomplish this objective are set forth in considerable detail (R. 31–34).

the same words as the corresponding allegations of count one (R. 45).

The district court sustained petitioners' demurrer upon the ground that the indictment contained irrelevant and prejudicial statements which would render a fair trial thereunder impossible, and the court also appears to have doubted whether the allegations in support of jurisdiction and venue were sufficient (R. 76–91). The Circuit Court of Appeals sustained the validity of the indictment as against all grounds of attack urged by the petitioners (R. 111–119). Judge Waller dissented upon the single ground that the allegations respecting the jurisdiction and venue of the district court were insufficient (R. 119–130).

ARGUMENT

I

The judgment of the Circuit Court of Appeals for which review is sought is not final. It merely reverses the district court's judgment sustaining petitioners' demurrers and remands the case to that court for further proceedings. The burden of showing exceptional embarrassment or inconvenience in the conduct of the cause, to justify review at this stage (*American Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 384; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 408–409), has not been met by petitioners. This is particularly true

in the light of the nature of their objections to the indictment, which raise issues of pleading. Eleven months have passed since the return of the indictment in November 1942 (R. 5). Allowance of the writ will further substantially delay bringing petitioners to trial since in that event the mandate of the Circuit Court of Appeals will not issue until after the decision and mandate of this Court. Any preliminary motions which petitioners may then file will still further delay trial of the cause. The filing of a motion for a bill of particulars is indicated by petitioners' attack upon the alleged indefiniteness of the indictment (R. 51–64; Pet. 9, 32–36) and by the expression of opinion by the Circuit Court of Appeals that a bill of particulars as to the individual defendants, if requested, should be granted (R. 119).

II

The holding of the court below that the indictment adequately shows the jurisdiction of the district court is not in conflict with the decision of any other circuit court of appeals or of this Court and is clearly correct. There are positive allegations that the conspiracy was "formed" and that it was "entered into" in part within the northern district of Texas (R. 29, 36).[3] A conspiracy under the Sherman Act is complete when it is formed and does not require either allegation or proof of an overt act in furtherance thereof, and

[3] Count two makes the same allegations (R. 38, 45).

the offense is committed and may therefore be tried in any district in which the conspiracy was formed, as well as in any district in which it has been carried out. *Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 402–403; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 252.

The indictment further explicitly alleges that the conspiracy was "carried out" in part within the district of indictment (R. 29, 36).[4] This is supplemented by the allegation that petitioners have performed in such district many of the acts [such as price wars against competitors, price fixing, obtaining discriminatory buying preferences], the commission of which is charged as being a part of petitioners' conspiracy (R. 36).[4] If petitioners, in order adequately to prepare their defense, require further particularization, this is the function of a bill of particulars. Moreover, there is specification of particular overt acts performed within the district of indictment, namely, selling foods below cost for the purpose of injuring and destroying competitors (R. 36–37, 45). Plainly, to do the very acts which it is alleged the conspiracy was formed to accomplish is to promote and further the conspiracy.[5]

[4] Count two contains the same allegations (R. 38, 45).

[5] The principal ground for the dissent below was that the allegation as to the commission of overt acts in the district of indictment must be disregarded in the absence of an allegation that these acts were performed in furtherance of the conspiracy charged in the indictment (R. 125–130).

III

The other grounds of the decision below which the petitioners specify as error likewise involve no conflict with decisions of other circuit courts of appeals or of this Court and were, we submit, properly determined.

(1) Both the district court and Circuit Court of Appeals held that the indictment charged a violation of the Sherman Act. It charges a broad conspiracy to restrain and dominate interstate commerce in food and food products by means of a wide variety of practices some of which, under the allegations, were in the direct course of interstate commerce and others of which may have operated immediately upon commerce that was intrastate.[6] The latter practices are, of course, not beyond the reach of the Sherman Act since it is settled that the statute "denounces every conspiracy in restraint of [interstate] trade including those that are to be carried on by acts constituting intrastate transactions." *Local 167* v. *United States*, 291 U. S. 293, 297.

(2) Respecting the contention that the indictment is too vague and indefinite to apprise petitioners of the offenses with which they were charged, the court below observed that, on the contrary, the indictment "has the fault not of

[6] For allegations of a conspiracy of somewhat similar scope and character, upheld against demurrer, see *Swift & Co.* v. *United States*, 196 U. S. 375.

vagueness and indefiniteness, but of a too detailed pleading of evidence" (R. 115). The indictment clearly meets the test that it set forth "the elements of the offense intended to be charged" and apprise the defendants of the accusation which they must be prepared to meet. *Hagner* v. *United States,* 285 U. S. 427, 431.

(3) The court below observed that petitioners' claim that the indictment is duplicitous is "the familiar one so often raised in connection with conspiracy indictments involving many persons and facts, that instead of charging one general conspiracy, the indictment charges many separate ones" (R. 115). Each of the two counts of the indictment alleges a single conspiracy and sets forth a variety of practices, each alleged to be a part of that conspiracy, by which the conspiracy was to be accomplished. Even assuming that some of those practices, if entered into as a separate and independent conspiracy, would be a violation of the Sherman Act, this does not make the indictment duplicitous. There may be "a single continuing agreement to commit several offenses" and the "allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' " *Braverman* v. *United States,* 317 U. S. 49, 52, 54. Nor is there basis for petitioners' contention that the ruling on duplicity presents a question of fed-

eral law which has not been, but should be, settled by this Court. This ruling, like all the other grounds of decision below, does not present any question of general law but simply the application of well-settled principles to a particular pleading. No question meriting review by this Court is therefore presented.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1943.

U. S. GOVERNMENT PRINTING OFFICE 1943